LIBRARY
SUPREME COURT, U. S.

No. 71-1062

Supreme Court, U.S.
FILED
DEC 13 1972
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

---

THE PROCTER & GAMBLE COMPANY, *Petitioner,*

v.

THE PUREX CORPORATION, LTD., *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

DANIEL M. GRIBBON
888 16th Street, N.W.
Washington, D. C. 20006
*Attorney for Petitioner*

*Of Counsel:*

COVINGTON & BURLING
888 16th Street, N.W.
Washington, D. C. 20006

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statute Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 4 |
| Conclusion | 18 |


### Table of Authorities

CASES:


*American Cyanamid Co.* v. *FTC*, 363 F.2d 757 (6th Cir. 1966) ..... 13

*Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959) ..... 14

*Brunswick-Balke-Collender Co.* v. *American B. & B. Corp.*, 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945) ..... 6

*Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970) ..... 13

*Colonial Stores, Inc.* v. *FTC*, 450 F.2d 733 (5th Cir. 1971) ..... 15

*Farmington Dowel Prod. Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969) ..... 4, 5, 6, 17, 18

*FTC* v. *Jantzen, Inc.*, 386 U.S. 228 (1967) ..... 17

*FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) ..... 3

*FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952) ..... 16

*Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15 (E.D. Mo. 1963), *rev'd*, 327 F.2d 725 (8th Cir. 1964), *on remand*, 245 F. Supp. 510 (1965) .. 6

*International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 315 F.2d 449 (1st Cir.), *cert denied*, 375 U.S. 820 (1963) ..... 6

*International Tag & Salesbook Co.* v. *American Salesbook Co.*, 6 F.R.D. 45 (S.D.N.Y. 1943) ..... 6

Page

*Meeker* v. *Lehigh Valley Ry.*, 236 U.S. 412 (1915) .... 14
*Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) .. 8
*Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) ....4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17
*Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 332 F.2d 346 (3rd Cir. 1964).....8, 16
*Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 379 U.S. 877 (1964) ..... 9
*Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629 (2d Cir.), *cert denied*, 344 U.S. 875 (1952) 9
*Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966) .. 13
*Procter & Gamble Co.* v. *FTC*, 358 F.2d 74 (6th Cir. 1966) ..... 3
*Proper* v. *John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923) ..... 6
*Purex Corp.* v. *Procter & Gamble Co.*, No. 25,416 (9th Cir. December 3, 1971) ..... 1
*Purex Corp.* v. *Procter & Gamble Co.*, 308 F. Supp. 584 (C.D. Cal. 1970) ..... 1
*Texaco, Inc.* v. *FTC*, 336 F.2d 754 (D.C. Cir. 1964) .... 13
*United States* v. *Jackson*, 390 U.S. 570 (1968) ..... 16
*United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 349 (D. Mass. 1950) ..... 6
*Wendel Shoes Inc.* v. *Shoenterprise Corp.*, 1958 Trade Cas. ¶ 69,132 (N.Y. Sup. Ct.) ..... 6

STATUTES:

Clayton Act, 38 Stat. 731 (1914):
Sec. 11 .....7, 17
Sec. 4, 15 U.S.C. § 15 (1970) ..... 3
Sec. 5, 15 U.S.C. § 16 (1970) .....2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
Sec. 7, 15 U.S.C. § 18 (1970) ..... 3

Finality Act, 73 Stat. 243 (1959), *codified at* 15 U.S.C. § 21 (1970) .....7, 17
15 U.S.C. §§ 1, 2 (1970) ..... 4
28 U.S.C. § 1254(1) (1970) ..... 2
28 U.S.C. § 1292(b) (1970) ..... 4

Page

Congressional Material:

51 Cong. Rec. 13851 (1914) ..... 11
51 Cong. Rec. 13901 (1914) ..... 11
51 Cong. Rec. 16276 (1914) ..... 6
51 Cong. Rec. 16319 (1914) ..... 11

*Hearings Before the Consumer Subcomm. of the Sen. Comm. on Commerce*, 92d Cong., 1st Sess. (1971) 14

Miscellaneous:

Amicus Brief for the United States, *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) ..... 9, 10, 13, 16, 17, 18

Beer, *Federal Trade Law and Practice* (1942) ..... 6

Bronstein & Miller, *Regulation of Trade* (1953) ..... 6

Elman, *The Regulatory Process: A Personal View*, 39 ABA Antitrust Section 901 (1976) ..... 13

Federal Trade Commission, *Annual Reports* (1964-1967) ..... 15

Friendly, *The Federal Administrative Agencies* (1962) 13

Harris, *FTC Pretrial Discovery Procedures*, 30 ABA Antitrust Section 136 (1966) ..... 12

Landis, *Report on Regulatory Agencies to the President-Elect* (1960) ..... 13

*Report of the ABA Commission to Study the Federal Trade Commission* (September 15, 1969) ..... 7

2 Toulmin *Anti-Trust Laws* (1949) ..... 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

---

No.

THE PROCTER & GAMBLE COMPANY, *Petitioner,*

v.

THE PUREX CORPORATION, LTD., *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 3, 1971, in this action for treble damages under the antitrust laws.

### OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported at 308 F. Supp. 584 (C.D. Cal. 1970). The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported. Both opinions are reprinted in the appendix to this Petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

## QUESTION PRESENTED

Whether Section 5(a) of the Clayton Act accords prima facie evidentiary effect in a private treble damage action to an administrative determination that has been enforced by a Court of Appeals.

## STATUTE INVOLVED

Section 5 of the Clayton Act provides in relevant part:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . .
>
> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole

or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: . . . ." 38 Stat. 731 (1914), *as amended and codified*, 15 U.S.C. § 16 (Vol. 3, p. 2984) (1970).

## STATEMENT.

The Federal Trade Commission charged and thereafter determined that the acquisition in 1957 of the Clorox Chemical Company (Clorox) by The Procter & Gamble Company (Procter) violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970). Upon review of the Commission's determination, which consisted of a prediction as to the competitive impact of the acquisition based exclusively on pre-acquisition evidence, the Court of Appeals for the Sixth Circuit set aside the Commission's order. 358 F.2d 74 (1966). This Court reinstated that order, finding that there was sufficient evidence to support the Commission's finding that the acquisition might affect competition in a manner proscribed by Section 7 of the Clayton Act. 386 U.S. 568 (1967). Upon remand, the Court of Appeals entered a decree affirming and enforcing the Commission order that Procter divest the Clorox business. Procter has since complied with that order.

The instant case is a private action brought under 15 U.S.C. § 15 (1970) by Purex Corporation, Ltd. (Purex) against Procter and Clorox. Purex was at the time of the acquisition and continues to be, next to Clorox, the nation's largest manufacturer of liquid bleach. The complaint alleges that the acquisition of Clorox by Procter and the conduct of the Clorox business during the period of Procter's ownership violated Section 7 of the Clayton Act and Sections 1 and 2 of

the Sherman Act (15 U.S.C. §§ 1, 2), and injured Purex. Treble damages in the amount of $523,500,000 are sought and jury trial is demanded. The complaint alleges that Section 5(a) of the Clayton Act makes the Commission order prima facie evidence in support of the Purex claim for damages.

After answer and before trial, Procter moved for a ruling that the Commission's order is outside the scope of Section 5(a). The District Court denied the motion and held that the order is prima facie evidence in this action, relying primarily upon a decision rendered by the Court of Appeals for the First Circuit while the motion was *sub judice*. *Farmington Dowel Prod. Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). Procter sought and obtained interlocutory review under the provision of 28 U.S.C. § 1292(b) (1970). The Court of Appeals for the Ninth Circuit affirmed, not on the ground that the Commission's order was prima facie evidence, as the District Court and the Court of Appeals for the First Circuit had held, but on the ground that the decree of the Sixth Circuit enforcing the Commission's order could be introduced as prima facie evidence under Section 5(a).

## REASONS FOR GRANTING THE WRIT

Whether a determination evolved in an administrative proceeding is prima facie evidence in a private treble damage action is a question of great public importance in the enforcement of the antitrust laws. It has not been, but should be, settled by this Court, particularly since it is a question that was considered and explicitly left unsettled in the opinion of this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (hereafter *3M*).

In *3M* this Court examined both provisions of Section 5: subsection (a) which makes an antitrust judgment in favor of the Government prima facie evidence in a private damage action; and subsection (b) which tolls the statute of limitations for bringing private actions during the pendency of Government proceedings. It held that the institution of an administrative proceeding served to toll the statute of limitations but left open the question whether the outcome of such a proceeding constituted prima facie evidence, pointing out, however, the Congressional purposes and policies that support the negative answer given by the lower federal courts over the years. Both the court below and the Court of Appeals for the First Circuit in *Farmington Dowel* (the only other Court of Appeals that has considered this question since *3M*) repudiated the settled precedent in the lower courts and disregarded the controlling factors in the interpretation of 5(a) that were laid down by this Court in *3M*. Consideration of those factors demonstrates that Congress did not intend, when it enacted Section 5 in 1914, to accord administrative determinations evidentiary weight in private treble damage actions.

1. While 5(a) by its terms makes a judgment in a prior Government case merely prima facie evidence in support of a private claim, experience has shown that informing the jury that the defendant has previously been adjudged to have violated the law has an overwhelming impact. Notwithstanding the defendant's opportunity to rebut, the basic issue of violation is invariably resolved in favor of the private claimant. *See Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 633 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *International Shoe Mach. Corp.* v. *United*

*Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963).[1]

Until the decision of this Court in *3M*, the established decisional authority had been that in enacting Section 5 Congress had not accorded administrative actions the unusual evidentiary significance in subsequent private damage actions that it had given to court actions.[2] *Proper* v. *John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923); *Brunswick-Balke-Collender Co.* v. *American B. & B. Corp.*, 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945); *International Tag & Salesbook Co.* v. *American Salesbook Co.*, 6 F.R.D. 45 (S.D.N.Y. 1943); *United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 349, 356 (D. Mass. 1950); *Wendel Shoes Inc.* v. *Shoeterprise Corp.*, 1958 Trade Cas. ¶ 69,132 (N.Y. Sup. Ct.); *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15 (E.D. Mo. 1963), *rev'd on other grounds but aff'd on issue at bar*, 327 F.2d 725 (8th Cir. 1964), *on remand*, 245 F. Supp. 510 (1965); *see also* Bronstein & Miller, *Regulation of Trade* 1106 (1953); Beer, *Federal Trade Law and Practice* 429 n.53 (1942); 2 Toulmin *Anti-Trust Laws* 118 (1949).

In *3M* this Court did not reject this line of authority. In holding that the institution of an administrative

---

[1] That such a result was not unforeseen appears from the floor debates over the Clayton Act, in which some congressmen urged that 5(a) should give "conclusive" rather than "prima facie" effect to prior judgments. Doubt was expressed as to the constitutionality of such a provision but assurances were given that the "prima facie" effect of 5(a) would in fact be conclusive with a jury. 51 Cong. Rec. 16276 (1914) (remarks of Representative Webb, one of the House conferees).

[2] "The prevailing view for many years was that . . . the private litigant could get no evidentiary assistance from the Commission pursuant to section 5(a)." *Farmington Dowel Prod. Co.* v. *Forster Mfg. Co.*, 420 F.2d 61, 67 (1st Cir. 1969).

proceeding tolled the statute of limitations under 5(b), it observed that 5(a) was "governed by different considerations as well as congressional policy objectives." 381 U.S. at 318. These differences are nowhere reflected in the decision of the court below or that of the First Circuit. Nonetheless both courts, by different and somewhat conflicting reasoning, took the broad step which this Court declined to take in *3M*. More than half a century after its enactment, 5(a) is now for the first time being expanded to make prima facie evidence in private damage suits, actions initiated, tried, and resolved by the Federal Trade Commission.[3] In addition, antitrust determinations by the Interstate Commerce Commission, the Federal Reserve Board, the Civil Aeronautics Board, and the Federal Communications Commission will also be entitled for the first time to prima facie evidentiary effect under 5(a).

This expansion of 5(a) is certain to have a substantial impact on the initiation, conduct and resolution of countless private damage actions where there has been a prior administrative determination of an antitrust violation. The treble damage evidentiary implications, if any, of determinations by the Federal Trade Commission and the other important agencies with antitrust enforcement authority should not be left in the present state of confusion. It is of vital public importance that this Court resolve the question that it left open in *3M* and authoritatively determine, as only it can, the scope of 5(a). Sound judicial administra-

---

[3] The Commission has broad powers under Section 11 of the Clayton Act, 15 U.S.C. § 21 (1970) to enforce the antitrust laws. In fact, it has become the primary enforcement agency of the Robinson-Patman Act. *Report of the ABA Commission to Study the Federal Trade Commission* 6, 64 (September 15, 1969).

tion calls for such a determination before, rather than after, juries have been instructed in this and many other private treble damage actions. Clearly, "resolution of this basic issue should be made at this stage of the litigation and not postponed until after a trial under the Court of Appeals' decision." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970).

2. The decision of the court below disregards and is contrary to the guidelines for the interpretation of 5(a) that were set out by this Court in *3M*. The Court of Appeals for the Third Circuit had reasoned in *3M* that both 5(a) and 5(b), which had been enacted in 1914 as a single section of the Clayton Act, extended to agency proceedings. 332 F.2d 346 (3rd Cir. 1964). This Court expressly rejected that analysis, pointed out significant differences in language, purpose, and impact between the two sections and concluded that "they are governed by different considerations as well as congressional policy objectives. This makes § 5(b) readily severable from § 5(a)." 381 U.S. at 318.

Acknowledging that "the precise language of § 5(b) does not clearly encompass Commission proceedings" (381 U.S. at 321), the Court nonetheless held it applicable to such proceedings. It did so because it found nothing in the legislative history that appeared to limit application of the tolling provision to judicial proceedings and because the broad purpose of Section 5—aid to private damage litigants—would be furthered by applying it to administrative proceedings. It observed that in the application of the tolling provision it is irrelevant whether the prior proceeding is judicial or administrative. In either case it is the institution of the proceeding that puts the defendant on notice that his conduct has been challenged. It is such notice

rather than the character or outcome of the proceeding that warrants tolling the statute of limitations.

The pervasive implication of *3M* was that 5(a) does not extend to administrative proceedings. The opinion emphasized that the operative scope of 5(a) is more "limited" and less "comprehensive" than that of 5(b), 381 U.S. at 317, 319, that the result reached in the prior proceeding, while unimportant in the application of the tolling provision, is all important in the application of 5(a). Moreover, in enacting 5(a) the Congress was "dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third." 381 U.S. at 317. Finally, there is the matter of legislative history. In *3M* the absence of any evidence that Congress intended to limit the tolling provision to judicial proceedings was crucial if not controlling. As we will show, there is abundant legislative history which demonstrates that Congress did intend to so limit the evidentiary thrust of Section 5.

In its analysis of Section 5, the Court's *3M* opinion closely paralleled the reasoning advanced by the Solicitor General in an *amicus* brief filed at the Court's request. *See* 379 U.S. 877 (1964). It was the position of the Solicitor General that "the considerations bearing upon whether an administrative order should be given the same effect as a court adjudication in subsequent litigation are altogether different from those determining whether the running of the statute of limitations should be tolled:" Brief, at 11. Analysis of these considerations led the Solicitor General to conclude that Congress had probably intended to exclude administrative determinations from 5(a) but, because of the different purpose of 5(b), that section could and

should be construed to include administrative proceedings. *Id.* at 32 n. 8.

Thus the clear teaching of this Court's decision in *3M* is that it is not "the literal wording" of Section 5 "that is controlling," [4] but the purpose and substantive thrust of each of its two quite different subdivisions. Yet the court below decided that 5(a) extends to administrative proceedings without so much as a mention of this Court's decision in *3M* or the "congressional policy objectives" which this Court had stressed as controlling. Instead, it adopted the most literal of interpretations that began and ended with the words "judgment or decree" used in 5(a). Seizing on the circumstances that the Commission's order in this case had been reviewed and affirmed, and finding that the action of the reviewing court was, literally, a "judgment or decree," the court below terminated its inquiry, ignoring this Court's mandate in *3M*, which specified congressional purpose and policy as the controlling factors in the interpretation of 5(a).

3. The relevant legislative history convincingly establishes that Congress intended to limit the evidentiary effect of Section 5 to judicial proceedings. In the Senate debates there was no dissent from Senator Walsh's succinct explanation:

> "The operation of the thing is this: If the United States shall proceed against any organization . . . and eventually, after a judicial proceeding going through all the courts . . . [the resulting] judgment stands and can be availed of by anybody who claims to have been damaged. . . .
>
> * * *

[4] 381 U.S. at 321.

> "[T]he violating corporation has had its day in court. It has had an opportunity to try out before a court, with all the forms of the law, every question involved in the lawsuit." 51 Cong. Rec. 13851 (1914).

Representative Floyd (one of the House conferees) explained the conference bill in terms that unmistakably excluded administrative proceedings from its evidentiary reach:

> "Under Section 5 of the bill any private litigant injured by the unlawful acts of any corporation where the Government of the United States has proceeded against such corporation and obtained a judgment, either in a court of law or equity, is allowed the use of that judgment or decree [in a suit]." 51 Cong. Rec. 16319 (1914).

Throughout the legislative history the view was expressed that it was appropriate to give evidentiary effect to government cases in subsequent private suits because the defendant had already had his "day in court" in the government suit. What congressmen meant in 1914 by "day in court" was made explicit by Senator Reed:

> "What is meant by your day in court? [It is the right of a litigant] *to put in his evidence* and take the judgment of a *court or jury* . . . ." 51 Cong. Rec. 13901 (1914) (emphasis supplied).

There was thus a clearly disclosed congressional intent to limit the evidentiary provision of Section 5 to judicial determinations.[5]

---

[5] Nothing in the legislative history provides the slightest support for the view, taken by the court below, that 5(a) was intended to apply to administrative determinations that had been affirmed by a reviewing court.

4. The teaching of the legislative history is confirmed by examination of the policy considerations underlying the evidentiary provision of Section 5, the other controlling factor pointed out by this Court in *3M*. When the outcome of a government antitrust action is the basis for imposing a treble damage penalty in a subsequent private action, the nature of the adjudicatory body that decided against the defendant and the quality of its decision-making cannot be ignored. Because of the significant differences in institutional purpose, structure, and procedure, the quality of adjudication by administrative agencies falls short of judicial decision-making in impartiality, detachment and objectivity. These differences, which explain why Congress would have wished to limit 5(a) to judicial proceedings, were not even considered by the court below.

For example, the court below took no account of the differences between court and agency procedures, *e.g.*, loose evidentiary rules and lack of meaningful discovery,[6] which can significantly affect the integrity of the fact-finding process. It also ignored the important institutional differences between courts and agencies. A court decides controversies on a case-by-case basis on the facts of record. An agency, however, not only decides cases but initiates and prosecutes them as well. This combination of functions creates grave problems of prejudgment. Former FTC Commissioner Philip Elman, who authored the Commission's opinion in this case, has concluded on the basis of his experience that "the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fair-

[6] *See, e.g.*, Harris, *FTC Pretrial Discovery Procedures*, 30 ABA Antitrust Section 136 (1966).

ness."[7] In addition, the fact that agencies must decide controversial issues of regulatory policy which have great economic importance exposes agency members to intense political pressures. These pressures are aggravated by the need for agencies to secure annual appropriations from Congress and the concern of agency members, who do not enjoy life tenure, for reappointment and reconfirmation.[8]

More subtle than the institutional and political pressures upon agencies are the implications of their policy-making roles. They are creatures of Congress with a mission to develop regulatory solutions in given areas of the economy. In fulfilling this mission, administrators inevitably come to regard adjudication as largely a vehicle for initiating or implementing policy rather than as a detached and considered fact-finding inquiry. All of these factors affect the accuracy and reliability of administrative decision-making and set it apart from judicial adjudication.[9]

---

[7] Elman, *The Regulatory Process: A Personal View*, 39 ABA Antitrust Section 901, 907 (1970).

[8] *See, e.g.*, Friendly, *The Federal Administrative Agencies* 142 (1962); Landis, *Report on Regulatory Agencies to the President-Elect* 13-15 (1960). FTC decisions have frequently been set aside because the members of the Commission had prejudged the matter or been exposed to improper political pressures. *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 763 (6th Cir. 1966); *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966); *Texaco, Inc.* v. *FTC*, 336 F.2d 754 (D.C. Cir. 1964).

[9] The differences between courts and agencies must have appeared especially vivid in 1914 when Section 5(a) was enacted. As the Solicitor General observed in his *3M amicus* brief (p. 34): "... Congress might well have concluded as a matter of substantive policy that it was unwise to give such prima facie effect to an order made without regard to the rules of evidence in the com-

We recognize, of course, that the basic purpose of Section 5 is to aid private suitors. The significant institutional differences, however, between courts and agencies—and the impact of these differences on the quality of adjudication—explain why Congress would nonetheless have limited 5(a) to court adjudications. As this Court stressed in *3M*, and the court below wholly ignored, 5(a) deals with the delicate area in which a judgment secured in an action between two parties may be used by a third. Because the effect on a jury of a prior determination of law violation is for practical purposes close to conclusive, use of an administrative determination in a treble damage action goes far to deprive a defendant of the right to jury trial. *Compare Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). In light of these problems of unfairness and possible constitutional difficulties[19] (*see Meeker* v. *Lehigh Valley Ry.*, 236 U.S. 412 (1915)) an interpretation of 5(a) to encompass administrative proceedings should not be made in the absence of clear indications that Congress considered and intended such a result.

---

paratively free and untried administrative proceedings of the proposed new Federal Trade Commission." As the analysis in the text indicates, the significant institutional differences between courts and agencies have not disappeared.

[19] The unfairness inherent in the decision of the court below is illustrated by current congressional consideration of consumer fraud prevention legislation. An administration bill gives the Department of Justice and the FTC concurrent jurisdiction to prevent unlawful consumer practices, but accords prima facie effect in subsequent private suits only to judgments entered in court actions brought by the Department of Justice. The head of the Department's Antitrust Division, now Judge Richard W. McLaren, testified that to give prima facie effect to FTC orders would cause unfairness to defendants because it would deprive them of jury trial, perhaps unconstitutionally, and of meaningful appellate review. *Hearings Before the Consumer Subcom. of the Sen. Comm. on Commerce*, 92d Cong., 1st Sess. at 49 (1971).

The legislative history is clear that Congress intended no such result in 1914, and in recent years it has consistently refused, despite repeated urging by the FTC, to amend the Clayton Act to include administrative proceedings.[11]

5. The court below found that judicial enforcement of the Commission's order against Procter made wholly unnecessary any inquiry into congressional intent and policy as to the scope of 5(a). It presumably reasoned that court affirmance and enforcement completely judicialized the administrative action. Demonstrably, however, the essential character of administrative action, with all its inherent defects and whatever its advantages, is not so readily transformed. Here, it was the Commission that initiated, prosecuted and decided this matter. It found the facts and determined that its own charges were legally sound. All that the courts did was to exercise the limited judicial review permitted of agency action.[12] Judicial review may weed out some of the more flagrant instances of agency prejudgment or exposure to political pressures, but it cannot erase the fundamental qualitative differences between administrative and judicial fact-finding and decision-making.

Moreover, nothing in the statute itself, its legislative history or in this Court's analysis in *3M* even remotely suggests that Congress intended to distinguish between agency action that had been contested and affirmed and that which had been accepted by the respondent with-

---

[11] Federal Trade Commission, *Annual Reports*: 1964: 33-34; 1965: 35-36; 1966: 43-44; 1967: 73-75.

[12] *See Colonial Stores, Inc.* v. *FTC*, 450 F.2d 733 (5th Cir. 1971) for a recital by an experienced appellate court of the substantive limitations on review of Federal Trade Commission action.

out appeal. As the Solicitor General pointed out in his *3M amicus* brief (p. 33), such a distinction leads to a "wholly artificial result."[13] Indeed, it leads to results that are not only artificial but irrational. Evidentiary effect would be denied to administrative orders so clearly correct as not to merit judicial review, but would be accorded to orders of more doubtful validity, as to which review was sought.

In finding and relying on the distinction between reviewed and unreviewed orders the court below also put a price upon court review of administrative action that Congress could never have intended and which may well be unconstitutional. In a cognate situation, this Court made it clear that exercise of the statutory right to review a Trade Commission order should not place a party "in a worse position than one who does not exercise that right." *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 479 (1952). In other areas also it has been made unmistakably clear that the imposition of penalties upon a statutory right to review raises grave constitutional questions. *E.g., United States* v. *Jackson*, 390 U.S. 570 (1968). Surely increased exposure to treble damage liability (in this case the claim is over $500,000,000) is an inordinate price to pay for court review, limited as it is, of the fact findings and regulatory theories advanced by the Commission in this case.

---

[13] The reasoning embraced by the court below—that court affirmance brings an administrative order within Section 5(a)—was also employed in the decision of the Court of Appeals in *3M* to support its view that the scope of Sections 5(a) and 5(b) is co-extensive and that both apply to administrative actions. *See* 332 F.2d at 358. That reasoning was not adopted by this Court in its *3M* decision, and the Solicitor General in his *3M amicus* brief (p. 33) noted that: "There are grave difficulties . . . with the [Court of Appeals] ruling that a Federal Trade Commission order became a final judgment or decree when carried to the court of appeals . . . but not otherwise—a wholly artificial result . . . ."

Both the court below and the Court of Appeals for the First Circuit in *Farmington Dowel* looked to considerations other than the congressional purpose and policy in enacting 5(a) in an effort to avoid the hard questions raised by this Court's decision in *3M*. The latter, conceding that in all probability Congress in 1914 had not intended to accord Commission actions prima facie effect in private damage suits, concluded that it had done so by the Finality Act of 1959.[14] That act, however, had a limited purpose—to simplify enforcement of FTC orders—and there is no basis in its language or legislative history for holding that it was intended to affect in any respect the conduct of private treble damage actions.[15] The court below, in a comparable diversion, professed to find a solution in Section 11 of the Clayton Act, which refers in passing to the "judgment" of the Court of Appeals in enforcing an administrative order.[16] But, like the Finality Act, Section 11 was never intended to have anything to do

---

[14] Pub. L. 86-107, 73 Stat. 243, *codified at* 15 U.S.C. § 21 (1970).

[15] As the Solicitor General pointed out in his *3M amicus* brief (pp. 33-34): "There are grave difficulties . . . with ascribing to the Finality Act an intention to convert a Commission order into a 'judgment or decree' for the purposes of Section 5(a)—a consequence never suggested during consideration of the Finality Act." Moreover, the Finality Act does not apply to the FTC order involved in this case, inasmuch as it resulted from a proceeding commenced before 1959, the effective date of that Act. *See FTC v. Jantzen, Inc.*, 386 U.S. 228 (1967).

[16] In the portion of Section 11 that provides for court review of an order of the Commission, there appears the following: "No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts." 38 Stat. 736 (1914). The section providing for an enforcement proceeding by the Commission provides that "the judgment and decree of the court shall be final . . . ." 38 Stat. 735 (1914).

with the conduct of private damage actions; it deals solely with procedures for court review of administrative orders. In the *3M amicus* brief (pp. 33-35) the Solicitor General rejected both the approach taken by the court below and that taken in *Farmington Dowel*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL M. GRIBBON
S. WILLIAM LIVINGSTON, JR.
888 16th Street, N.W.
Washington, D. C. 20006

*Attorney for Petitioner*

*Of Counsel:*

COVINGTON & BURLING
888 16th Street, N.W.
Washington, D. C. 20006

February 18, 1972

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25,416

PUREX CORPORATION, LTD., a corporation,
*Plaintiff-Appellee,*

vs.

THE PROCTER & GAMBLE COMPANY, a corporation
*Defendant-Appellant.*

Appeal from the United States District Court
for the Central District of California

Decided and Filed December 3, 1971

Before: CHAMBERS and DUNIWAY, Circuit Judges, and SOLOMON, District Judge:*

DUNIWAY, Circuit Judge:

In August, 1957, The Procter & Gamble Company acquired the Clorox Chemical Company. On September 30, 1957, the Federal Trade Commission instituted a proceeding against Procter charging that the acquisition tended to lessen competition and therefore violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Commission held that the acquisition violated Section 7. 63 F.T.C. 1465 (1963). On review, the Court of Appeals for the Sixth Circuit set aside the Commission's order as not supported by substantial evidence. *Procter & Gamble Co.* v. *F.T.C.*, 6 Cir., 1966, 358 F.2d 74. The Supreme Court reinstated the Commission's order. *F.T.C.* v. *Procter & Gamble Co.*, 1967, 386 U.S. 568.

This appeal arises in a private antitrust action brought by Purex Corporation, Ltd. against Procter. Purex claims

* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

that the acquisition of Clorox by Procter and the conduct of the Clorox business during the period of Procter's ownership violated Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act, and that as a result of these unlawful acts it has suffered large damages. Purex further claims that Section 5 (a)[1] of the Clayton Act, 15 U.S.C. § 16 (a) entitles it to use the Commission's order and the judgment of the Supreme Court as *prima facie* evidence in this action. In the court below Procter sought a ruling that the Commission order and the judgment could not be so used because neither is a "final judgment or decree" within the meaning of Section 5(a). The court denied Procter's motion, and Procter appeals under 28 U.S.C. § 1292(b). We affirm.

In *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 1 Cir., 1969, 421 F.2d 61, the First Circuit held that a final order of the Federal Trade Commission based upon a charge of violating Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (5 U.S.C. § 13(a)) was admissible under Section 5(a) in a treble damage action charging the same violations. We are in general agreement with the reasoning in *Farmington*, but we need not go so far as the court went in that case.

In *Farmington*, the order in question was the F.T.C. order reviewed in *Forster Mfg. Co.* v. *F.T.C.*, 1 Cir., 1966,

---

[1] "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title." 15 U.S.C. § 16(a).

361 F.2d 341. This was an order to which the Finality Act of 1959, Pub.L. 86-107, 73 Stat. 243, now 15 U.S.C. § 21, was held applicable in *Farmington, supra*, 421 F.2d at 70-71 n. 25. In the *Forster* case, Forster Mfg. Co. sought review of an F.T.C. order under 15 U.S.C. § 21(c). That section provides:

> "To the extent that the order of the Commission . . . is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the Commission. . . ."

However, the court did not do this; the opinion concludes (361 F.2d at 343): "The petition will be dismissed." The Supreme Court denied certiorari on January 9, 1967, 385 U.S. 1003. Thus the F.T.C. order, rather than being embodied in a decree, became final as an order of the F.T.C., issued under 15 U.S.C. § 21(b), by reason of the following provision of 15 U.S.C. § 21(g):

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> . . . .
>
> (3) upon denial of a petition for certiorari if . . . . the petition for review has beeen dismissed by the Court of Appeals. . . ."

It is that final order of the *Commission* that was received in evidence in the *Farmington* case. It is true that in footnote 3 to the opinion in *Farmington* (421 F.2d at 65-66) it is stated that in *Forster* "the order . . . was affirmed by us." It does not appear, however, that the court ever issued an order under § 21(c) commanding obedience to the F.T.C. order, or that any such order of the court was offered in evidence in *Farmington*.

Here, the situation is different. The Commission's proceeding against Procter was begun in 1957, but its order was not entered until November 26, 1963. Thus, if the view

of the court in *Farmington* is correct, the Finality Act also applies to that order. The trial judge did not agree; he was of the opinion that the Finality Act does not apply because the F.T.C. proceeding was initiated before the effective date of that Act, citing *F.T.C. v. Jantzen, Inc.*, 1967, 386 U.S. 228. We need not decide whether the *Farmington* court or the trial judge is right.

Under the Finality Act, 15 U.S.C. § 21 as amended by that Act, and assuming that it is applicable to the F.T.C. proceeding, Procter could and did seek review of the F.T.C. order. The culmination of the review proceedings was the decision of the Supreme Court in *F.T.C. v. Procter & Gamble Co.*, 1967, 386 U.S. 568. There, the Court remanded to the Court of Appeals ". . . with instructions *to affirm and enforce* the Commission's order." (386 U.S. at 581, *emphasis added.*) Presumably, the Court of Appeals has complied with these instructions and has issued a final "judgment and decree" "enforcing the . . . [order] to the extent that such order is affirmed." (§ 21(c)). Obviously, that judgment and decree is long since final under § 21(g)(4).

On the other hand, if § 11 of the Clayton Act (38 Stat. 734) as it read before the effective date of the Finality Act, is the statute applicable to the F.T.C. order against Procter, the result is the same. Under the fourth paragraph of that section, Procter could and did seek review in the Court of Appeals. And the fourth paragraph of the section empowered the court, in such a proceeding, "to affirm . . . as in the case of an application by the Commission . . . for . . . enforcement. . . ." The third paragraph, dealing with an application by the Commission "for the enforcement of its order," gives the court power "to make and enter . . . a decree affirming . . . the order of the commission. . . ." The sixth paragraph refers to "the judgment of the court to enforce." Just such a judgment has been entered and is now final.

As the Supreme Court said in *United States* v. *Morton Salt Co.*, 1950, 338 U.S. 632, 641 "... the [Federal Trade] Commission's cease and desist order was merged in the court's decree. . . ." Or, as stated by the Second Circuit in *NLRB* v. *Filtron Co.*, 1962, 309 F.2d 184, a decree of the Court of Appeals enforcing an order of an administrative body (in that case the National Labor Relations Board) ". . . is, of course, the court's order, and not that of the Board." (Quoting from *NLRB* v. *Local 111, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 1 Cir., 1960, 278 F.2d 823). Of course the Clayton Act Section 5 was as much a part of that Act as was the original section 11. Section 5 makes admissible "A final judgment or decree . . . rendered in any civil . . . proceeding brought . . . on behalf of the United States under the anti-trust laws . . . ." We have precisely such a decree here. Surely a proceeding under § 11 is a "civil proceeding."[2] Surely a proceeding by the F.T.C. is brought "on behalf of the United States." *N. J. Wood Finishing Co., supra*, n. 2, at 353. And there can be no dispute that the decree is "final." All of the foregoing is equally applicable both to the judgment of the Supreme Court in *F.T.C.* v. *Procter & Gamble Co., supra*; and to the decree of the Court of Appeals for the Sixth Circuit, entered in response to the Supreme Court's instructions.

---

[2] As originally enacted, § 5 referred to any "suit or proceeding in equity" rather than to "any civil . . . proceeding" as it now reads. As is pointed out in *N.J. Wood Finishing Co.* v. *Minnesota Mining & Mfg. Co.*, 3 Cir., 1964, 332 F.2d 346, 355 (*aff'd. on other grounds*, 1965, 381 U.S. 311), a court of appeals, in reviewing an order of the F.T.C. sits "not as an appellate court but as a court of equity enforcing . . . the order of the F.T.C.".

With the merger of law and equity under the Federal Rules of Civil Procedure, both a "suit [at law]" and "a proceeding in equity" are subsumed under the phrase "civil proceeding." Rule 2 uses the phrase "civil action."

The Third Circuit was also of the opinion that a final decree enforcing an F.T.C. order was a final decree referred to in § 5. *N. J. Wood Finishing, supra*, at 358.

Because we find that these judgments fall squarely within the language of section 5, we need not review at length the legislative history of that section as the Supreme Court did in *Minnesota Mining & Mfg. Co.* v. *N.J. Wood Finishing Co.*, 1965, 381 U.S. 311, or as the First Circuit did in *Farmington, supra*. Suffice it to say that we can find nothing in that legislative history indicating that the Congress did not intend the words "judgment or decree" in section 5 to include a "decree" or "judgment" expressly authorized by section 11.

Procter argues that to allow an appellate court's enforcement to transform a Commission order into a "final judgment or decree" imposes an unconstitutional penalty upon the exercise of its right to judicial review. It says that an aggrieved respondent would seek review of a Commission order only at the risk of having the order used against it in a subsequent proceeding to impose treble damages. We find no merit in this argument. When the Clayton Act was adopted, the only enforcible order of the F.T.C. was one embodied in the decree of a Circuit Court of Appeals. Thus section 5 could only refer to such a decree. We have never heard it suggested that the somewhat similar dilemma in which a defendant or respondent in a court or F.T.C. proceeding to enforce the anti-trust laws finds itself by reason of the exclusion from the operation of section 5 of consent judgments or decrees renders the section unconstitutional.

All that section 5 does is that it "... establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. ... Such statutes have been generally sustained ... as have many other state and Federal enact-

ments establishing other rebuttable presumptions." *Meeker & Co. v. Lehigh Valley R.R.*, 1915, 236 U.S. 412, 430, dealing with a comparable provision of the Act to Regulate Commerce, § 16, 24 Stat. 379. We do not think that the risk of being subjected to such a "rebuttable presumption" is a sufficient burden on the right of review to render it unconstitutional. And if it be ultimately established that an unreviewed and unreversed, but final, F.T.C. order is also admissible under section 5, the argument now made would no longer have any possible validity.

We think it important to emphasize what we do *not* decide. The trial judge expressly reserved "for another day" "the matter of the extent to which evidentiary use may be made" of the judgment in question. So do we. The trial judge referred to the Commission's order. As we have pointed out, the order is merged in the decree of the Court of Appeals. It is the decree, therefore, that we hold admissible. We leave to the trial judge the question as to the extent to which the underlying record, made before the Commission, may be referred to to shed light on the evidentiary effect of the decree. We also leave to another day the question whether an F.T.C. order, final under the Finality Act, but not merged into a decree or judgment of a court of appeals, is admissible under § 5 of the Clayton Act.

Affirmed.

Civil No. 67-1546-WPG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PUREX CORPORATION, LTD., a corporation, *Plaintiff*,

vs.

THE PROCTER & GAMBLE COMPANY, a corporation, and THE CLOROX COMPANY, a corporation, *Defendants*.

**Memorandum of Decision and Order**

Filed January 22, 1970

The present action is for treble damages of more than five hundred million dollars, sought pursuant to section 4 of the Clayton Act (15 U.S.C. § 15) and arising out of the acquisition and retention by defendant Procter & Gamble (Procter) of the Clorox Chemical Company (Clorox) in 1957, the alleged effect of which has been "substantially to lessen competition . . . [and] to tend to create a monopoly," in violation of section 7 of the Clayton Act (15 U.S.C. § 18).[1] Prior to the filing of the complaint in this action, the Federal Trade Commission, after extensive hearings, ruled that such acquisition had been in violation of section 7, and ordered divestiture. (*In re The Procter & Gamble Co.*, 63 F.T.C. 1585 (1963)). The Court of Appeals reversed (358 F. 2d 74 (6th Cir. 1966)), and was in turn reversed by the Supreme Court, which directed that the order of the Commission be affirmed and enforced. (386 U.S. 568 (1967)).

The parties to this action have filed and argued motions which require a determination by this court of the extent to which, if at all, the hereinabove mentioned Commission order may be of support to Purex's damage claim. More

[1] The complaint also charges Procter and defendant Clorox Company (Procter's wholly owned subsidiary to whom the Clorox assets were transferred) with conspiracy to restrain trade and to obtain a monopoly in interstate commerce in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

particularly, the defendant Procter seeks a ruling that the divestment order by the Commission, as affirmed by the Supreme Court, was not a "final judgment or decree" within the meaning of section 5(a) of the Clayton Act (15 U.S.C. § 16(a)),[2] and that such section therefore does not require that the Commission order be received in this action as *prima facie* evidence that Procter's acquisition of Clorox violated the antitrust laws of the United States.

The plaintiff, on the other hand, not only urges that section 5(a) *does* apply to the Commission order, but goes farther and contends, as a preferred alternative, that such order conclusively settles the issue of Procter's violation of section 7, under the common law principle of collateral estoppel.

It is the conclusion of this court that the divestment order issued by the Commission is a "final judgment or decree" within the meaning of section 5(a) and therefore is admissible as *prima facie* evidence in this litigation to the extent provided by that section. It is also concluded that the common law principle of collateral estoppel does not serve here to increase the effect of the Commission order beyond that accorded by section 5(a).

*The Admissibility Of A Final Commission Order.*

The Supreme Court, in *Minnesota Mining and Mfg. Co. v. New Jersey Wood F. Co.*, 381 U.S. 311 (1965) (*3M*),

---

[2] "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

construed section 5(b) of the Clayton Act (15 U.S.C. § 16(b)), and found that its provisions (which pertain to the tolling of the statute of limitations) apply to proceedings of the Federal Trade Commission. The opinion made several observations pertinent to an interpretation of the closely related section 5(a), but specifically refrained from asserting any conclusion as to the applicability of section 5(a) to Commission orders. After the *3M* decision, and until December 10, 1969, no reported decision gave direct consideration to the problem here concerned. Accordingly, the excellent briefs directed to the current issue were submitted on the then valid assumption that this court would be making the first post-*3M* attempt to reach a decision on this important issue, and the same thought influenced most of the preparatory work for this memorandum.

However, on December 10, 1969, there was published a decision in *Farmington Dowel Products Co.* v. *Forster Mfg. Co., Inc.*,— F. 2d — (1st Cir. 1969) (Antitrust and Trade Regulation Report, 12/16/69, page X-1). The opinion by Judge Coffin, speaking for a unanimous court, disclosed a careful study of the legislative history of section 5(a); discussed the few judicial decisions pertinent to that statute; traced the evolution of the Commission's responsibilities, powers, activities, and rules of practice; and concluded that section 5(a) is applicable to final orders of the Commission.

Inasmuch as I agree with the conclusion reached by Judge Coffin and, in most respects, with his reasons therefor, the length of this memorandum has been considerably reduced. Instead of attempting to set out in full the basis for each step in my own analysis, I shall, for the most part, simply state the general proposition and incorporate by reference Judge Coffin's explanations in justification thereof.

*The Commission proceeding was a "civil or criminal proceeding brought by or on behalf of the United States."* In

order for section 5(a) to be applicable, the Commission proceeding resulting in the order here concerned must have been a "civil or criminal proceeding brought by or on behalf of the United States . . ." Substantially the very same words are used in section 5(b) to describe the type of proceeding to which that statutory provision applies.[3] *3M* held that section 5(b) is applicable to Commission proceedings. In the absence of any apparent reason why the same words should be given different meanings in the two closely related sections, it is concluded that *3M* established that a Commission proceeding is a civil or criminal proceeding brought by the United States, within the meaning of section 5(a) as well as section 5(b). *Farmington Dowel Products Co.* v. *Forster Mfg. Co., Inc.*, — F. 2d — (1st Cir. 1969) (Antitrust and Trade Regulation Report, 12/16/69, page X-1):

*The Commission order was a "judgment or decree," within the meaning of section 5(a).* The opinion in *Farmington* acknowledged that from a semantic standpoint these words "referred only, or chiefly, to courts." Judge Coffin recognized also that those who participated in the congressional debates that preceded the enactment of section 5(a) were doubtless thinking of courts as being the sources of the judgments that would be used as evidence in subsequent

---

[3] "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

litigation. However, from his review of those debates, he concluded that Congress had displayed no intention to preclude the possibility of a Commission order being given the effect that section 5(a) prescribed for a judgment or decree. He inferred, instead, that the principal concern of Congress in this respect was to make sure that section 5(a) effect be given only as a result of a proceeding that had been fairly conducted and in which there had been accorded a full opportunity to be heard.

The opinion in *Farmington* then proceeded to discuss the evolution of the responsibilities, powers, activities, and rules of practice of the Commission, and, in light thereof, expressed the belief that

> ". . . the legislative concern that the defendant get a 'day in court' before section 5(a) operates against him is fully satisfied by a Federal Trade Commission proceeding." — F. 2d —, —
>
> (1st Cir. 1969) (A.T.R.R., 12/16/69, page X-6).

This court agrees, and accordingly holds that the Commission order here concerned is a "judgment or decree", as that term is used in section 5(a).

*The Commission order is also "final".* Section 5(a) accords evidentiary effect only to a *final* judgment or decree. In 1959, Congress amended section 11 of the Clayton Act, thereby enacting legislation commonly and appropriately referred to as the Finality Act, 15 U.S.C. § 21, 73 Stat. 243. This amendment provides automatic finality to orders of the Commission upon expiration of the time allowed for filing a petition for review in the court of appeals (15 U.S.C. § 21(g)(1)). It also provides that such orders shall become final upon affirmance by the court of appeals or by the Supreme Court (subsections (g)(3) and (4)). The Finality Act thus gives significant indication of the congressional conviction that Commission orders are worthy of being enforced, even in the absence of judicial review

thereof. That legislation also would settle the question of the finality of the order here concerned, if it is applicable.

The answer to this question involves a matter of chronology. Section 2 of the Finality Act provided that the changes made in the law by that Act ". . . shall have no application to any proceeding initiated before the date of enactment of this Act [July 23, 1959] . . . ." 73 Stat. 245. The Commission proceedings began with the filing of the complaint, in 1957, well before the adoption of the Finality Act; but the divestiture order came much later, on November 26, 1963. The same sequence of events was present in the *Farmington* case, and the court there held that the Finality Act applies to post-1959 *orders*, irrespective of the date the proceedings were instituted. However, I am unable to agree with Judge Coffin (see footnote 25 of his opinion in *Farmington*) that *F.T.C.* v. *Jantzen*, 386 U.S. 228 (1967) does not stand in the way of such a result. In *Jantzen*, it seems to me that Justice Clark, in speaking for the Court, construed the Finality Act to mean that no part thereof shall have any application to any proceeding initiated by the Commission before its enactment, on July 23, 1959. It is quite true that *Jantzen* was concerned with the enforcement of a Commission order that *predated* the Finality Act. However, the words of the statute, and the analysis made of them in the *Jantzen* opinion, indicate quite clearly to me that the Commission proceedings here concerned are not affected by the Finality Act.

Nonetheless, in the opinion of this court, the divestiture order with which we are concerned must be considered to have the finality required by Section 5(a). The purpose of such requirement is necessarily to make certain that a "judgment or decree" later used against a defendant in a private damage suit is not one that may be reversed on appeal; it should be an order that may be relied upon as constituting the "last word", as far as the issues in the litigation that gave rise to it are concerned. In this

case, as is indicated above, the order of the Commission was reviewed by the court of appeals and by the Supreme Court. The latter tribunal, in an opinion by Justice Douglas, ruled that ". . . the Commission's findings were amply supported by the evidence" (386 U.S. at 570), and the opinion concluded with an order that the matter be remanded to the court of appeals ". . . with instructions to affirm and enforce the Commission's order." (386 U.S. at 581) I do not see how any Commission order could have more finality, for purposes of section 5(a), or otherwise.

The court of appeals' opinion in the *3M* litigation contained the following observation:

> "While our 1914 legislators would not have accepted a bare FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have resulted in its being considered a 'final judgment or decree', within Section 5(a)." *New Jersey Wood Finishing Co.* v. *Minnesota Mining & Manufacturing Co.*, 332 F.2d 346, 358 (3d Cir. 1964), aff'd on other grounds, 381 U.S. 311 (1965).

In this case the fact that affirmance was by the Supreme Court gives the quoted comment *a fortiori* application.

The defendants contend that to hold that affirmance by an appellate court may bestow upon a Commission order the section 5(a) finality that it would not otherwise merit, imposes an unconstitutional penalty upon the exercise of the right to judicial review. It is argued that such a holding would mean that an aggrieved defendant would appeal from an administrative order at the peril of having such order used later in imposing treble damages against him. In the context of the present situation, this court believes that the defendants' cries of pain are much louder than are warranted by the nature and extent of the wound.

It must be remembered that the issue of violation by the defendants of section 7 of the Clayton Act (15 U.S.C. § 18),

i.e., whether the effect of the acquisition complained of "*may be* substantially to lessen competition, or to tend to create a monopoly" (emphasis added), was thoroughly and vigorously litigated before the Commission and before the court of appeals and the Supreme Court. The question here is whether the order that was issued and upheld after such exhaustive litigation must be ignored altogether in the present proceedings or whether it may be used simply as a relevant starting point. If the parties here were the same as those in the Commission proceedings, the facts implicit in the resulting order would be conclusive against the defendants, under the principle of *res judicata*. Here, under section 5(a), a new plaintiff may make use of such order, but only on a *prima facie* basis.

A comment in the opinion of the Court in *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 430 (1915) with respect to a comparable statute,[1] which makes certain orders of the Interstate Commerce Commission *prima facie* evidence in later actions, is equally pertinent here:

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in anywise work a denial of due process of law. . . . Such statutes have been generally sustained[,] . . . as have many other state and Federal enactments establishing other rebuttable presumptions."

It is readily recognized, as the defendants contend, that the right to judicial review may not be curtailed or discouraged by the imposition of severe or unreasonable penalties upon the exercise of such right. However, in view of all of the foregoing, this court is unable to conclude that

---

[1] 25 Stat. 859 (1889), as amended, 49 U.S.C. § 16(2) (1964).

the application of section 5(a) to the Commission order because it was affirmed by the Supreme Court, unreasonably penalizes the defendants.

Accordingly, it is adjudged that the Commission order of November 26, 1963, is a final judgment or decree within the meaning of section 5(a), and it will be given in these proceedings the evidentiary effect required by that statute.

*The Principle of Collateral Estoppel Does Not Enlarge The Section 5(a) Significance Of The Commission Order.*

According to section 5(a), the Commission order must be admitted in this case as *prima facie* evidence as to all matters respecting which the order would be an estoppel against Procter had this action been brought by the Government. In referring to section 5(a), Justice Clark said in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951):

> "We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit."

The reference to this benefit of estoppel as being conferred "subject only to a defendant's enjoyment of its day in court against a new party," clearly refers to the fact that the judgment or decree is admissible only as *prima facie* evidence, according to the explicit words of the statute.

But application here of the principle of collateral estoppel, as urged by the plaintiff, would mean that the Commission order would be *conclusive* as to all matters to which it applied. The Commission order cannot be both *prima facie* and conclusive; and, it having been determined that the statute applies, the statute must govern. Accordingly, the principle of collateral estoppel is adjudged not to be

applicable to this case, and the defendants are not estopped to deny anything expressed or implied in the Commission order.

*The Evidentiary Significance Of The Commission Order.*

Before concluding this memorandum, a word of caution is believed appropriate. Nothing in the foregoing is intended to contain any suggestion concerning this court's view as to how important the legal issue here decided is to the case at hand. The matter of the extent to which evidentiary use may be made of the Commission order is for another day. The plaintiff, at the appropriate time, will have the burden of showing wherein the Commission order and the factual findings upon which it was based are relevant, material and persuasive to the issues here to be tried. See *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969).

*Order Disposing Of Pending Motions*

For the reasons stated in this memorandum it is ordered as follows:

(a) The defendants' motion for a ruling that the Commission order, described in paragraph 24 of the complaint herein, was not a "final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States", within the meaning of Section 5(a) of the Clayton Act, 15 U.S.C. §-16(a), is denied.

(b) The plaintiff's motion for an order that the findings of the Commission shall be accorded collateral estoppel effect against the defendants, is denied.

*Certification For Immediate Appeal*

The issues here concerned raise important questions of law that have not been resolved by the Court of Appeals for this Circuit. A final determination of these matters

will clearly assist counsel in preparing for trial and may materially advance the ultimate termination of this litigation. This certification is made pursuant to 28 U.S.C. § 1292(b), in the event that counsel for either side desire to appeal from the interlocutory orders herein contained.

/s/ William P. Gray
United States District Judge

Supreme Court, U. S.
F I L E D
MAR 20 1972

IN THE

# Supreme Court of the United States

October Term, 1971
No. 71-1062

THE PROCTER & GAMBLE COMPANY,

*Petitioner,*

*vs.*

THE PUREX CORPORATION, LTD.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071
*Attorney for Respondent.*

*Of Counsel:*
ROBERT E. COOPER
JOHN J. SWENSON
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, California 90071

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## SUBJECT INDEX


| | Page |
|---|---|
| Question Presented | 1 |
| Statute Involved | 2 |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 4 |
| Conclusion | 21 |

# TABLE OF AUTHORITIES CITED

Cases


Page

Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015; 91 L.Ed. 1219 (1947) ..... 8

Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 150 F.2d 69 (2d Cir. 1945) ..... 10, 11

Carpenter v. Central Arkansas Milk Products Ass'n Inc. (W.D. Ark.), 1966 Trade Cases ¶71,817 ..... 5

Farmington Dowel Prods. Co. v. Forster Mfg. Co., Inc., (D.Me.), 1967 Trade Cases ¶72,262 ..... 4, 5, 8, 18

First Nat'l. City Bank of N.Y. v. Gilliland (D.C. Cir. 1958), 257 F.2d 223, cert. den. 358 U.S. 837 ..... 19

Harrison v. Paramount Pictures Inc., 115 F.Supp. 312 (E.D.Pa. 1953), aff'd. 211 F.2d 405 (3d Cir. 1954) ..... 9

Highland Supply Corp. v. Reynolds Metals Co., 221 F.Supp. 15 (E.D.Mo. 1963), rev'd 327 F.2d 725 (8th Cir. 1964), on remand, 245 F.Supp. 510 (1965) ..... 11

International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449 (1st Cir.) Cert. den. 375 U.S. 820 (1963) ..... 8

International Tag and Salesbook Co. v. American Salesbook Co., Inc., 1940-1943 Trade Cases, ¶56,267 (S.D.N.Y. 1943) ..... 9, 10

Johnson v. United States, 163 Fed. 30 (1st Cir. 1908) ..... 16

Meeker v. Lehigh Valley R. Co., 236 U.S. 412 (1915), 59 L. Ed. 644 ..... 9

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) ..... 4, 5, 6, 7, 8, 9, 11, 12, 14, 16, 21

Page

Procter & Gamble Co., In re, 63 F.T.C. 1585 (1963), rev. 358 F.2d 74 (6th Cir. 1966) aff'd 386 U.S. 568 (1967) ..... 2

Proper v. John Bene & Sons, 295 Fed. 729 (E.D. N.Y. 1923) ..... 9, 10, 12, 13, 14

Proper, Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 734 ..... 12

Schenck v. U.S. (1919), 249 U.S. 47 ..... 19

Theater Enterprise v. Paramount Film Dist. Corp., 346 U.S. 537 (1954) ..... 9

United States v. E.I. duPont de Nemours & Co. (D.Del. 1951), 11 F.R.D. 132 ..... 21

United States v. Jackson (1968), 390 U.S. 570 ..... 19

United States v. United Shoe Machinery Corp. (D.C. Mass. 1950), 89 F.Supp. 349 ..... 9, 20, 21

Wendel Shoes, Inc. v. Shoenterprise Corp. (N.Y. Sup.Ct. 1958); 1958 Trade Cases, 69,132 ..... 10

Y & Y Popcorn Supply Co. v. ABC Vending Corp. (1967 E.D.Pa.), 263 F.Supp. 709 ..... 5

Miscellaneous

51 Congressional Record (House) 9491 (1914) ..... 17, 18

House Report No. 627, 63rd Cong., 2d Sess. 14 ..... 15

Report of the Attorney General's National Committee to Study the Antitrust Laws, 1965, pp. 374-377 ..... 7

Second Initial Decision of the Hearing Examiner, The Procter & Gamble Company, Docket No. 6901, p. 3 ..... 8

Senate Report No. 698, 63rd Cong., 2d Sess. 45 ..... 15

Statutes


| | Page |
|---|---|
| Clayton Act, Sec. 5 | 2, 3, 6, 7, 10, 12 |
| Clayton Act, Sec. 5(a) | 1, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 18, 19, 21 |
| Clayton Act, Sec. 5(b) | 6, 7, 11, 12 |
| Clayton Act, Sec. 7 | 2, 3, 8 |
| Code of Federal Regulations, Title 16, Sec. 2.1 | 20 |
| Code of Federal Regulations, Title 16, Sec. 2.15(a) | 20 |
| Sherman Act, Sec. 1 | 3 |
| Sherman Act, Sec. 2 | 3 |
| 38 Statutes at Large (1914), p. 731 | 2 |
| United States Code, Title 15, Sec. 1 | 3 |
| United States Code, Title 15, Sec. 2 | 3 |
| United States Code, Title 15, Sec. 16 | 2 |
| United States Code, Title 15, Sec. 18 | 2, 3 |
| United States Code, Title 15, Sec. 21 | 3 |
| United States Code, Title 28, Sec. 1292(b) | 3 |


Textbooks


| | |
|---|---|
| 12 Antitrust Bulletin, A Re-Examination (1967), p. 46 | 5 |
| 4 Davis, Administrative Laws, Sec. 28.18, pp. 93, 94 | 19 |
| 4 Davis, Administrative Laws, Sec. 28.19, p. 106 | 19 |
| 64 Michigan Law Review (1966), p. 1160 | 5 |
| Shores, Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act, 54 Iowa L. Rev. 434, 453 (1968) | 5 |
| Wilson, Federal Trade Commission Orders and the Clayton Act, Sec. 5 | 5 |

IN THE

# Supreme Court of the United States

October Term, 1971
No. 71-1062

THE PROCTER & GAMBLE COMPANY,

*Petitioner,*

*vs.*

THE PUREX CORPORATION, LTD.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, The Purex Corporation, Ltd. (hereinafter "Purex") accepts Petitioner, The Procter & Gamble Company's (hereinafter "P&G") statement of the opinions below and of jurisdiction.

### Question Presented.

Whether the judgment and decree of a Court of Appeals affirming and enforcing a decision of the Federal Trade Commission that a defendant violated the antitrust laws of the United States constitutes *prima facie* evidence pursuant to Section 5(a) of the Clayton Act in a subsequent treble damage action.

## Statute Involved.

Section 5 of the Clayton Act provides in relevant part:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereof: . . ." 38 Stat. 731 (1914), as amended and codified 15 U.S.C. § 16.

## Statement of the Case.

In August, 1957, P&G acquired the Clorox Chemical Company (hereinafter "Clorox"). In September of 1957, the Federal Trade Commission instituted a proceeding against P&G charging that the acquisition was in violation of Section 7 of the Clayton Act (15 U.S.C. § 18). After extensive hearings, the Federal Trade Commission ruled that such acquisition was in violation of Section 7 and ordered divestiture. (*In Re the Procter & Gamble Co.*, 63 F.T.C. 1585 (1963)). The Court of Appeals reversed (358 F.2d 74 (6th Cir. 1966)); and was in turn reversed by this Court which directed that the order of the Commission be affirmed and enforced. (386 U.S. 568 (1967)).

The Petition here arises from a private antitrust action brought by Purex against P&G in which Purex contends that the acquisition of Clorox by P&G and the conduct of the Clorox business during P&G's ownership violated Section 7 of the Clayton Act (15 U.S.C. § 18), and Sections 1 and 2 of the Sherman Act. (15 U.S.C. §§ 1 and 2). As a result of these unlawful acts, Purex contends it has suffered large damages. The complaint alleges that Section 5(a) of the Clayton Act entitles Purex to use the Commission's order, and the judgment of the Supreme Court and Court of Appeals affirming and enforcing the order as *prima facie* evidence of violation of Section 7 of the Clayton Act in this action. P&G sought a ruling in the District Court that the Commission order and the judgment could not be so used, because neither was a "final judgment or decree" within the meaning of Section 5 (a). The District Court denied P&G's motion, and P&G appealed, pursuant to 28 U.S.C. § 1292(b). The Court of Appeals for the Ninth Circuit affirmed, emphasizing that it did not decide the extent to which evidentiary use might be made of the judgment in question. The Circuit left to the trial judge the question of the degree to which the underlying record, made before the Commission, might be referred to, to shed light on the evidentiary effect of the decree. Also left for another day was the question of whether a Commission order, final under the Finality Act of 1959 (15 U.S.C. § 21), but not merged into a decree of judgment of the Court of Appeals, was admissible under Section 5 of the Clayton Act.

## REASONS FOR DENYING THE WRIT.

The decision of the Ninth Circuit in this case does not deal with the broad question of whether a Federal Trade Commission order, made final by virtue of the provisions of the Finality Act of 1959, is admissible in a subsequent treble damage suit, pursuant to the provisions of Section 5(a). Thus, the decision is of limited general impact, and is not the question left unsettled in the opinion of this Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (hereinafter "*3M*"). Here there is a "judgment or decree", as P&G conceded in its memorandum submitted to the District Court.

Moreover, the decision by the Ninth Circuit is fully consistent with the only other Court of Appeals decision that has considered the question since *3M*, *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61, (1st Cir. 1969). These decisions by no means repudiate settled precedent in the lower courts and, in fact, are fully consistent with the teaching laid down by this Court in *3M*. Any decision contrary to that made by the Ninth Circuit would be irrational and discriminatory in that both the Justice Department and the Commission have co-extensive jurisdiction in many areas. The decision as to which agency pursues a particular antitrust law violator in the first instance is often an arbitrary one, and the availability of the benefit of Section 5(a) to individual plaintiffs would thus turn on the arbitrary decision of which agency instituted proceedings.

The thrust of the legislative history of 5(a) is also consistent with the Ninth Circuit's opinion. The primary goal of the legislators in enacting 5(a) was to pro-

vide assistance to private plaintiffs who have been injured by violations of antitrust laws. The legislators intended to go as far as due process would allow them in effecting that goal.

Finally, no impermissible burden on appeal is created by the decision of the Ninth Circuit. The qualities of administrative determinations easily comport with due process requirements, and there are good and sufficient reasons for allowing an affirmed Commission order to be *prima facie* evidence in a subsequent treble damage action.

1. P&G, in its Petition, states that the "persuasive implication" of this Court's opinion in *3M* is that 5(a) does not include administrative orders (Br. of Appellant, p. 7). P&G aside, commentators have reached a directly contrary conclusion.[1] In addition to the opinion below and the opinion in Farmington, three district courts which have considered the question of the applicability of Section 5(a) to FTC decrees since the Supreme Court's *3M* decision read *3M* as the commentators have, and held that FTC orders are within the terms of Section 5(a).[2]

---

[1]". . . the plain implication of . . . [3M] is that FTC orders are admissible as prima facie evidence." Note, 64 Mich. L.Rev. 1160 (1966). "From . . . [3M], *we may conclude with reasonable assurance* that any restraining order which issues from [Commission] . . . proceedings may, under §5(a) be introduced in a subsequent private action against the delinquent party as *prima facie evidence*. . . ." Wilson, *Federal Trade Commission Orders and the Clayton Act §5: A Re-Examination*, 12 Antitrust Bull. 46 (1967) (emphasis supplied); Shores, *Treble Damage Antitrust Suits; Admissibility of Prior Judgments Under Section 5 of the Clayton Act*, 54 Iowa L. Rev. 434, 453 (1968).

[2]*Carpenter v. Central Arkansas Milk Products Ass'n Inc.* (W.D. Ark.), 1966 Trade Cases ¶71,817; *Y & Y Popcorn Supply Co. v. ABC Vending Corp.* (1967 E.D.Pa.), 263 F.Supp. 709, 711; *Farmington Dowel Prods. Co. v. Forster Mfg. Co., Inc.* (D.Me.), 1967 Trade Cases ¶72,262.

The fact that this Court's *3M* decision supports the conclusion that 5(a) applies to FTC decisions is abundantly clear upon analysis of the opinion. First, the decision in *3M* rested primarily on the basis of the well-known Congressional intention to use private damage suits as an aid to enforcement of antitrust laws.

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. This construction will lend considerable impetus to that policy.
>
> * * *
>
> In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions."
>
> 381 U.S. 311, 318, 320.

The Court in *3M* also noted that:

> "Acceptance of petitioner's position would make enjoyment of these intended benefits [Section 5(b)] turn on the arbitrary allocation of enforcement responsibility between the Department and the Commission, and we must therefore reject it."
>
> 381 U.S. 311, 320.

Second, the same legislative history that P&G urges to defeat application of 5(a) in this action was dealt with in *3M*, when it was held that 5(b) encompassed Commission proceedings. Since, at the time of its passage, Section 5 was one section, and not divided into parts (a) and (b), it is clear that the same considerations were involved.

Third, the Court rejected a narrow, highly technical interpretation of the language of Section 5 (specifically the phrase "civil or criminal proceedings") and interpreted the language more generously in order to fulfill the clearly expressed Congressional purpose of affording private parties maximum benefits from Government antitrust actions. Since the phrase "civil or criminal proceedings" is found in both 5(a) and 5(b), the same Congressional purpose generated both sections. The canon of statutory construction adopted of necessity applies to the language of 5(a) as well as 5(b).

While it is true, as contended by P&G that "the clear teaching of this Court's decision in 3M is that it is not 'the literal wording' of Section 5 'that is controlling,'" (Petitioner's Brief, p. 10), it is also clear that this Court did not mean to imply that a judgment or decree which does fit the literal language of the statute could be eliminated from its purview.

2. Any result other than that reached by the Ninth Circuit would be irrational and discriminatory. Both the Justice Department and the Federal Trade Commission are charged by Congress with enforcement of various portions of the antitrust laws. In many areas the jurisdiction of the Justice Department and of the Federal Trade Commission is coextensive, and both agencies exercise jurisdiction. While the two agencies coordinate their activities so that there is no duplication of efforts, the decision as to which agency pursues any particular antitrust law violator in the first instance often is an arbitrary one. Report of the Attorney General's National Committee to Study the Antitrust Laws, 1965, pp. 374-377.

If Section 5(a) did not encompass Federal Trade Commission decisions, the availability to individual

plaintiffs of the benefit of Section 5(a) would depend on the arbitrary decision of whether the Federal Trade Commission or Justice Department institutes the proceedings against the defendant. The unfairness of such gross inequality of treatment was noted by this Court in *3M*, and constituted one of the reasons underlying the decision of the First Circuit in *Farmington*.

Another compelling reason to accord *prima facie* effect to the findings of the Federal Trade Commission under Section 5(a) is that the Federal Trade Commission proceeding against P&G for its acquisition of Clorox culminated in 6,300 pages of transcript developed over a period of fourteen months in ten different cities (Second Initial Decision of the Hearing Examiner, *The Procter & Gamble Company*, Docket No. 6901, p. 3). From the viewpoint of judicial economy and efficiency, and in light of the objectives of the statute,[3] it is irrational to require plaintiff, in presenting its *prima facie* case to retrace the steps of the Commission to prove that the P&G—Clorox combine violated Section 7. Such duplication of effort would probably consume many months of the trial court's time, would be extremely costly to plaintiff, and would inconvenience many witnesses who have already testified fully.

P&G's argument that the effect on a jury of the prior Federal Trade Commission determination is, for all practical purposes, conclusive, is not well taken. In fact, juries have found for defendants in the face of a prior finding of violation admitted under Section 5(a).

---

[3] *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 453 (1st Cir.) *Cert. den.* 375 U.S. 820 (1963); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947).

*Theater Enterprise v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954); *Harrison v. Paramount Pictures Inc.* 115 F.Supp. 312 (E.D.Pa. 1953), *affirmed*, 211 F.2d 405 (3rd Cir. 1954). The provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, it is merely a rule of evidence. *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 430 (1915), 59 L.Ed. 644, 657.

3. P&G urges that prior to *3M*, "the established decisional authority had been that Congress did not intend to include administrative actions within Section 5(a)" (Br. of Appellant, p. 6). In support, P&G cites six cases, which upon examination, however reflect either off-hand dicta, or a total dependency on the 1923 opinion in *Proper v. John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923), the rationale of which has been eviscerated by statutory changes and court opinions.

In *United States v. United Shoe Machinery Corp.* 89 F.Supp. 349 (D.C. Mass. 1950), the Court discussed the fact that Commission's cease and desist orders may be as drastic as decrees of district courts, and in that connection, made the off-hand comment that the only point of difference was that the district courts' decrees, unlike the Commission's orders, could be used as *prima facie* evidence in a private treble damage suit. The Court was not actually faced with the question, and volunteered the statement, apparently without the benefit of argument.

The rest of the cases referred to by P&G all rely on *Proper*. In *International Tag and Salesbook Co. v. American Salesbook Co., Inc.*, 1940-1943 Trade Cases,

¶56,267 (S.D.N.Y. 1943), the Court considered pleadings containing allegations of proceedings before the Commission, which had resulted in a consent decree. It is unclear whether or not the consent decree was entered before testimony was taken. The Court merely stated that it doubted whether Federal Trade Commission orders came within Section 5(a), citing *Proper*.

The *Wendel Shoes, Inc. v. Shoenterprise Corp.* (N.Y. Sup.Ct. 1958), 1958 Trade Cases, ¶69,132 opinion consists of one paragraph wherein the Court stated that it felt the Federal Trade Commission was an investigating body as opposed to a judicial tribunal and its order had no binding effect until it was approved by judicial sanctions. The Court simply cited the *Proper* case.

In *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.*, 150 F.2d 69 (2d Cir. 1945), the Second Circuit first decided that a Commission order was admissible on the basis of the Wheeler-Lea amendment to the Federal Trade Commission Act in 1938, which made Commission orders "final". The Court stated that given the legislative changes, the Commission's orders became, for the purposes of Section 5(a), "final judgments and decrees". In fact, however, the amendment of 1938 did not affect the finality of Federal Trade Commission orders enforcing the Clayton Act. It affected the finality only of FTC orders under Section 5 of the Federal Trade Commission Act. Upon rehearing the Court recognized this fact, withdrew its earlier opinion, and held Federal Trade Commission proceedings inadmissible, citing *Proper*. The only difficulty the Second Circuit had with the use of the Federal Trade Commission order as *prima facie* evidence was its lack of "finality". Of course, the

Finality Act of 1959 does today exactly what the *Brunswick* Court first thought the 1938 amendment to the Federal Trade Commission Act did, and in any event, the FTC order against P&G is final by reason of the appeal.

Three opinions are involved in *Highland Supply Corp. v. Reynolds Metals Co.*, 221 F.Supp. 15 (E.D. Mo. 1963), *rev'd on other grounds but aff'd. on issue at bar*, 327 F.2d 725 (8th Cir. 1964), *on remand*, 245 F.Supp. 510 (1965). In the opening case, the District Court faced two questions. First, it had to determine whether or not a Federal Trade Commission proceeding appealed and affirmed by a Court of Appeals tolled the Statute of Limitations. On this point, the Court held that it did not toll the statute on the basis that the Federal Trade Commission proceeding was not a "civil proceeding". The Court also held that appellate review would not toll the Statute of Limitations because it was not instituted by the United States. Of course, both of those conclusions have been changed by the *3M* case. The second question facing the District Court was whether the Court of Appeals' affirmance of Federal Trade Commission order was available to the plaintiff as *prima facie* evidence. On this question, the Court again relied on the now discredited theory that the appeal had been instigated by the defendant. Further, the Court held that the proceeding was not a "civil or criminal proceeding" and therefore could not qualify as *prima facie* evidence. This holding also has been effectively repudiated by the *3M* case, which held the identical words of Section 5(b) included Federal Trade Commission proceedings.

On appeal to the Eighth Circuit, the District Court was reversed on other grounds, but the Court of Ap-

peals apparently approved the District Court's conclusion that Section 5 of the Clayton Act did not apply to Commission orders, merely citing *Proper, Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d at 731.

The case was remanded, but in the interim this Court decided the *3M* case. The District Court stated that the Supreme Court opinion in *3M* had not decided the question of whether the Federal Trade Commission orders were admissible under Section 5(a), and did not detract from the Eighth Circuit's opinion that Federal Trade Commission decrees would not be admissible as evidence. On that basis, the Court held the Commission order inadmissible under Section 5(a). This holding is simply inconsistent with the reasons in the Eighth Circuit's prior opinion. The Eighth Circuit's reasons for not permitting Section 5(a) to apply to a Federal Trade Commission proceeding were the same as those regarding 5(b). Therefore, this Court's holding regarding Section 5(b) should have entirely obliterated that rationale for the decision on Section 5(a) in the District Court. Again, it should be remembered that the Eighth Circuit based its opinion on the *Proper* case.

Finally we come to *Proper v. John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923). At the very outset it should be noted that the case involved a Commission investigation of alleged violations of the Federal Trade Commission Act, and the Court held that the Act was not an antitrust law. Thus, only by way of dicta does this opinion provide authority for the other cases cited

by P&G. In the *Proper* case, the Court stated what it felt were the requirements for admissibility of a judgment or decree under Section 5(a):

> "An analysis of section 5 of the Clayton Act, supra, discloses that there are six requirements contained in said section 5 with which compliance must be had in order to make the proceedings competent evidence in this suit: (1) The judgment or decree must be final. (2) It must have been rendered in a criminal prosecution or in a suit or proceeding in equity. (3) The prosecution, suit or proceeding must have been brought by or on behalf of the United States. (4) It must have been instituted under the anti-trust laws. (5) It must be to the effect that a defendant has violated those laws. (6) It shall be prima facie evidence against that defendant."
>
> *Proper. v. John Bene & Sons,* 295 Fed. 729, 731, 732.

As to the requirement number one, the *Proper* Court stated that there had been no final judgment or decree. Elsewhere in the opinion, however, the Court discussed what it felt was required in order that the decree be final. The Court stated:

> "The result of the proceedings before the Commission is an order which has no effect in itself, unless made operative by the Circuit Court of Appeals, which has power of review. The doctrine of res adjudicata has no application unless a final judgment is involved. * * *" 295 Fed. 729.

In other words, it would appear that even the *Proper* Court would have had no objection on this ground to

admitting a decree which had been enforced by an Appellate Court. Also, the Finality Act now has eliminated this objection.

As to requirement number two, the Court doubted whether the proceedings before the Commission were proceedings in equity. However, given the holding of this Court in *3M*, this finding by the *Proper* Court has lost its validity. Question three, regarding whether or not the proceeding was brought by or on behalf of the United States, was answered by the *Proper* Court in the negative. This holding, of course, has been effectively overruled by this Court's decision in *3M*. As to question four raised by the *Proper* Court, it held that the Federal Trade Commission Act was not an antitrust law—an objection which is certainly not applicable to our case which involves the Clayton Act. Similarly, the Court answered the fifth question in the negative, on the basis that there had been no violation of the antitrust laws shown by the Federal Trade Commission, since it had brought its action under the Federal Trade Commission Act.

The *Proper* case and its progeny afford no solace whatsoever to P&G in this action. The bases for *Proper* and the other decisions were entirely undercut by this Court in *3M*, even before the instant decision was rendered.

4. P&G's contention that the legislative history of Section 5(a) discloses an intent to limit its application to judicial determinations is simply not supported by that history. At most the history indicates that Congress did not consider the possibility of allowing private treble damage suitors to utilize Federal Trade Commission orders as *prima facie* evidence under

Section 5(a). On the other hand, the legislative history of the Clayton Act demonstrates unequivocally that the purpose of Congress in passing Section 5(a) was to assure the effectiveness of private treble damage actions as a means of enforcing the antitrust laws, by giving individual plaintiffs the fullest possible benefits from Government actions.

As stated in the committee reports, the "entire provisions is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws."

HR No. 627, 63rd Cong., 2d Sess. 14;

S. Rep. No. 698, 63rd Cong., 2d Sess. 45.

More specifically, Congress' purpose in enacting Section 5(a) was to provide damaged private parties as much assistance as possible from Government suits within the constitutional limitations of due process. This was especially clear in the debates on the version of 5(a) which would have made findings conclusive, against the defendant in a successful Government suit, and against a damaged private party in an unsuccessful Government action. They indicate that, although Congress was using the language relating to courts and one's "day in court", the underlying concern related to the constitutional problem of due process. Since Commission proceedings have long been held to comply with all due process requirements, it would be unreasonable to construe the language of 5(a) narrowly so as to defeat Congress' intent of providing maximum assistance from Government suits consistent with the constitutional limitations of due process.

The applicable principal of statutory construction was stated masterfully by Mr. Justice Holmes, sitting

on circuit in *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908):

> "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."
>
> *Johnson v. United States*, 163 Fed. 30, 32.

This Court in *3M* expressed the same rule of statutory construction as follows:

> "It is true that the precise language of §5(b) does not clearly encompass Commission proceedings. But it is not the literal wording of such a provision that is controlling where, as here, Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed congressional purpose while the other defeats it. * * *"
>
> *Minnesota Min. & Mfg. Co. v. N. J. Wood Co.*, 381 U.S. 311, 321 (1965).

Turning to specific examples, it is undisputed that the Congressmen equated a party's "day in court" with due process of law. Representative Prouty of Iowa, in

discussing the proposal to make the unfavorable judgment in a Government suit binding upon a damaged private party, stated:

> "Mr. Chairman, the question here involved is a very simple one, if carefully analyzed. Article V of the amendment to the Constitution which binds the Federal Government expressly provides that no man shall be deprived of life, liberty, or property without due process of law. Every court that has ever passed upon that provision of the Constitution [the due process clause] . . . has held that no one can be deprived of his property unless he has had his day in court. 'Due process of law' has been held again and again to mean that he must have his day in court, by notice and otherwise."
>
> 51 Cong. Rec. (House) 9491 (1914).

Prouty argued that since a private party who had been damaged by a violator of the antitrust laws would not have been a party to the original government proceeding, he could not be bound by the judgment in that action.

The fact that Congress equated the judicial process with the concepts of due process is perhaps best illustrated by a passage from a speech by Representative Green of Iowa:

> "That proposition (no denial of due process) is as old as the law in this country. The provision of the Constitution forbids it is found in the fifth amendment, which provides that no man shall be deprived of his property or rights without due process of law, and yet they seek to provide in this section that he (private treble damage suitor)

shall be deprived of his property without any due process of law, without even notice of hearing or any day in court. So far as that particular matter is concerned there need be no discussion. When it comes to the question of fairness and justice in the matter I think it is fair that the defendant corporation, who has had its day in court, should be estopped, while the third party, who had had no opportunity to be heard, ought not to be estopped or concluded."

51 Cong. Rec. 9491 (1914).

The legislative history shows that Congress intended to afford damaged private parties the right to use the results of Government proceedings against violators of the antitrust laws, subject only to one limitation—that the defendant be accorded due process of law. Since Federal Trade Commission proceedings meet the requirements of due process of law, Section 5(a) should be construed to give effect to the overriding Congressional purpose of maximum possible assistance to injured parties.

5. The argument that Section 5(a) would be unconstitutional if it were interpreted to make admissible the decision of a court reviewing a Federal Trade Commission order but not an unaffirmed order is untenable. First, if, as was held in *Farmington*, the Federal Trade Commission orders and findings covered by the Finality Act are admissible, as *prima facie* evidence, P&G's constitutional argument is moot. However, even if such orders were admissible only when affirmed on appeal, no violation of constitutional rights would result. First, it is questionable whether a general constitutional right to judicial review of administrative adjudications exist.

See 4 Davis, Administrative Law, Section 28.18, pages 93, 94 and Section 28.19, page 106; and *First Nat'l. City Bank of N.Y. v. Gillilland* (D.C. Cir. 1958), 257 F.2d 223, *cert. den.* 358 U.S. 837) holding that the International Claim Settlement Act making decisions of the Foreign Claim Settlement Commission final and unreviewable on all questions of fact and law was not unconstitutional.

Even if there is a constitutional, as opposed to a statutory, right to appeal from Federal Trade Commission divestiture orders, Section 5(a) does not constitute an impermissible burden on that right. Even constitutional rights are not absolute (see the famous dictum of Justice Holmes in *Schenck v. U.S.* (1919), 249 U.S. 47). As this Court recognized in *United States v. Jackson* (1968), 390 U.S. 570, it is only unnecessary burdens which are impermissible. It would by no means be unreasonable for Congress to have allowed *prima facie* effect to an appealed order of the Federal Trade Commission and not to an unappealed one. The appealed order was final, while an unappealed order was not. Also, an appeal certainly gives an additional stamp of correctness which Congress might have desired. In any event, the resulting burden is not unnecessary, in that it is in furtherance of valid Congressional purpose, to afford as many private plaintiffs as possible the benefit of successful Government antitrust actions.

As the Ninth Circuit stated in rejecting the same argument:

> "We find no merit in this argument. When the Clayton Act was adopted, the only enforcible order of the F.T.C. was one embodied in the decree

of a Circuit Court of Appeals. Thus section 5 could only refer to such a decree. We have never heard it suggested that the somewhat similar dilemma in which a defendant or respondent in a court or F.T.C. proceeding to enforce the antitrust laws finds itself by reason of the exclusion from the operation of section 5 of consent judgments or decrees renders the section unconstitutional."

6. The attack on the quality of adjudication of administrative agencies made by P&G overlooks the important fact that the administrative decision in question (and every administrative decision which might become subject to the rule followed by the Ninth Circuit) was reviewed and affirmed by the courts. If, as P&G contends, improper political pressure and ex parte approaches influence Commission decisions, no Commission decision should be accorded any effect—much less *prima facie* effect, since the basic requirements of due process would not have been met. Such improper influence, whether it occurs in an FTC proceeding or a court proceeding, is a matter for a reviewing court on an individual basis.

Certainly criticism of the Federal Trade Commission for not adhering to strict rules of evidence is no argument against giving Commission decisions *prima facie* effect. The Commission's evidentiary rules[4] are designed to achieve the same purpose as court rules, adducing the truth; and in antitrust cases, tried before judges, courts follow much the same rules as the Commission follows, as was emphasized by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*

[4]1949 Rules, 16 CFR §2.1 *et seq.*, especially §2.15(a).

(D.C. Mass. 1950), 89 F.Supp. 349 at 356. See also, *United States v. E.P.I. duPont de Nemours & Co.* (D.Del. 1951), 11 F.R.D. 132, 135. The logical conclusion of P&G's argument is that judgments in court cases tried without juries would be inadmissible under Section 5(a) since they too fail to employ the evidentiary rules P&G would impose as a requirement for according decisions *prima facie* effect.

P&G argues that the Federal Trade Commission is a policy-making body which cannot give unbiased attention to the particular litigants before it. P&G ignores the fact that, insofar as 5(a) is concerned, the Commission is adjudicating actions under the Sherman and Clayton Acts, and therefore necessarily decides cases within the confines of that legislation. In fact, it can be argued that the Commission, because of its expertise, is better qualified to assess whether or not a particular business acquisition may or may not tend to lessen competition—the touch-stone of Section 7 of the Clayton Act.

**Conclusion.**

The decision by the Ninth Circuit below is not only consistent with the literal requirements of Section 5(a). It is also fully in accord with the rules set forth by this Court in *3M*. The petition for a writ of certiorari should be denied.

Respectfully submitted.

JULIAN O. VON KALINOWSKI
*Attorney for Respondent.*

*Of Counsel:*
ROBERT E. COOPER
JOHN J. SWENSON
GIBSON, DUNN & CRUTCHER

March 17, 1972.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 27 1972
MICHAEL RODAK, JR., CLERK

No. 71-1062

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

---

THE PROCTER & GAMBLE COMPANY, *Petitioner*,

v.

THE PUREX CORPORATION, LTD., *Respondent*.

---

## PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

---

DANIEL M. GIBBON
888 16th Street, N. W.
Washington, D. C. 20006
*Attorney for Petitioner*

*Of Counsel:*

COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

March 27, 1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

---

No. 71-1062

THE PROCTER & GAMBLE COMPANY, *Petitioner,*

v.

THE PUREX CORPORATION, LTD., *Respondent.*

---

## PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

---

Some eight years ago this Court expressly declined to read the evidentiary provision in Section 5 of the Clayton Act as encompassing administrative determinations. It did so fully recognizing that the objective of the statute was to aid private treble damage claimants but also recognizing that the characteristics of the administrative process, particularly in 1914 when the statute was enacted, were such as to create a most serious doubt that Congress contemplated that an

administrative decision should provide an evidentiary basis for money damage recovery by a third party. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 379 U.S. 877 (1964) (*3M*). That decision has imposed upon the courts and litigants involved in the private enforcement of the antitrust laws a pall of uncertainty that will remain until the questions it raises are authoritatively resolved.

The passage of time has by no means dispelled the doubts as to the quality of administrative fact finding that underlie the questions reserved in *3M*. For example, the member of the Federal Trade Commission who wrote for the Commission in the instant case, a distinguished and experienced public servant, has since made unmistakably clear the extent to which the proceedings of that agency constitute policy making rather than adjudication. His reasoned conclusions are that administrative efforts at "case-by-case adjudication" have not only been "inefficient and ineffective" but "in many cases, unfair". As for the "test case"—the Commission proceeding against this petitioner was admittedly of that character—his observation is that the result "is likely to be a foregone conclusion".*

Neither the Court below nor the Court of Appeals for the First Circuit, which has also dealt with the evidentiary provision in Section 5, chose to grapple with the fundamental issues raised and reserved in *3M*. While respondent's brief in opposition argues in favor of the result reached by the Court below, it too treats the unsettling observations of this Court in *3M* as though they had never been uttered. A writ of

---

* Elman, *The Regulatory Process: A Personal View*, 39 ABA Antitrust Section 901, 907-08 (1970).

certiorari should be granted to consider the implications of that decision and to settle authoritatively this important question in the private enforcement of the antitrust laws.

Respectfully submitted,

DANIEL M. GRIBBON
888 16th Street, N. W.
Washington, D. C. 20006
*Attorney for Petitioner*

*Of Counsel:*

COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

March 27, 1972